

KIRKLAND & ELLIS

Kirkland Alert

Law Commission Publishes Recommendations on the UK's Suspicious Activity Reporting Regime

21 June 2019

Introduction

On 18 June 2019, the Law Commission of England and Wales (the “Commission”) published the long-awaited [report](#) on its review into the anti-money laundering (“AML”) regime in the UK and, in particular, the operation of the suspicious activity reporting (“SARs”) regime (the “Report”).

The primary purpose of the review was to improve the prevention, detection and prosecution of money laundering and terrorism financing in the UK. More specifically, the review aimed *'to address systemic problems in the suspicious activity reporting process, in particular the “consent regime”,¹* which allows individuals and businesses to submit a report requesting a defence against money laundering offences.

The Current SARs Regime

The review was prompted, in part, by the increasing criticism of the current SARs regime, which is widely viewed as being inefficient, resulting in too many low quality SARs. For example, between April 2017 and March 2018, the UK National Crime Agency (“NCA”), the government agency responsible for analysing SARs, received and processed 463,938 SARs, many of which it said were of a poor quality. These low quality SARs often contain limited or no useful intelligence, leading to a waste of time and resources for both the person making the report and the NCA.

The Commission noted that the reasons behind the deficiencies in the current SARs regime include: (1) a broad definition of “criminal property” in section 340 of the Proceeds of Crime Act 2002 (“POCA”), which requires that the proceeds of **any** criminal conduct, committed at **any** time and of **any** value, be reported (the so-called “all-crimes” “for all time” approach); (2) the threat of individual criminal liability for those working in the regulated sector for a failure to submit a SAR, which encourages defensive reporting likely to produce a high volume of low quality SARs; and (3) a lack of clarity in the definitions of key terms, which results in the law being misunderstood or inconsistently applied by those with reporting obligations.

Recommendations for Reform

The Commission makes 19 recommendations to improve the effectiveness and efficiency of the current SARs regime. Among these, the Commission has recommended the following:

1. **The consent regime** – the consent regime be retained, as it continues to serve a useful purpose in providing valuable intelligence to the NCA.
2. **Statutory guidance** – POCA be amended to impose a statutory obligation on the Secretary of State to publish guidance on the suspicion threshold, appropriate consent and the “reasonable excuse” defence to not submitting a SAR when required.
3. **Advisory Board** – an Advisory Board be established to assist in drafting the abovementioned guidance, as well as to measure the effectiveness of the SARs regime and advise the Secretary of State on ways to improve it.
4. **"All-crimes" approach** – the “all-crimes” approach to money laundering be retained. However, the Report notes that the implementation of statutory guidance around what may amount to a “reasonable excuse” defence could lead to a greater focus on reporting only serious crimes by, in essence, allowing the NCA to “switch off” the flow of certain types of SAR if they were proving to be of little value.²
5. **SAR submissions** – the Secretary of State to introduce a prescribed form for a SAR and that reporters be permitted to submit one SAR for multiple transactions on the same account/company/individual.
6. **Ring-fencing** – an exemption to the existing AML framework be introduced to allow criminal property to be ring-fenced by credit and financial institutions in order to prevent entire bank accounts being frozen when proceeds of crime are mixed with clean funds (and which is to be supplemented by guidance).

The Commission also considered a number of further reforms, opting not to make specific recommendations. For example, the Commission considered whether further reporting and record keeping requirements should be introduced, such as to require reporting if certain specific criteria are met or when a transaction is occurring in a specific location. Whilst certain law enforcement agencies, such as the NCA, favoured the introduction of these additional obligations, the Commission considered that, in the absence of clear evidence as to the utility of such provisions, it would be unreasonable to make recommendations that would be likely to burden the regulated sector with additional costs.

The Commission also considered three possible further reforms: (1) corporate criminal liability; (2) extraterritorial jurisdiction of the money laundering offences; and (3) the legal conduct overseas exception (commonly known as the “Spanish bullfighter” exception). The Commission has made no recommendations on the introduction of corporate criminal liability under POCA *“at this time”*,³ but has recommended that the Government seeks to clarify the law of extraterritorial jurisdiction. It has also recommended that the Government consider the scope of the legal conduct overseas exception, and the need for related guidance around transactions involving the cannabis industry.

Finally, whilst not making any recommendation, the Commission considered the way in which information about suspected money laundering is shared between private institutions and law enforcement agencies, and how this sharing could be improved. This includes considering whether it might be appropriate to permit information sharing before a suspicion crystallises, and, if so, how that might be achieved.

What does this mean?

The Commission recognises that the current reporting system is not working as effectively as it should for reporters or law enforcement.

The recommendations in the Report reflect a practical approach to tackling some of the major issues with the SARs regime without requiring any major changes to the statutory framework in Part 7 of POCA or the substantive offences themselves.

Implementation of some of the key recommendations will involve input from a new Advisory Board made up of relevant experts from the public and private sectors, and much of the success of these proposals will turn on the effectiveness of this Board. In the crucial area of the proposed statutory guidance, the devil will be in the drafting.

1. Law Commission report titled 'Anti-money laundering: the SARs regime', page 18. ↩

2. Ibid., page 85.↩

3. Ibid., page 190.↩

Authors

[Marcus Thompson](#)

Partner / [London](#)

[Satnam Tumani](#)

Partner / [London](#)

[Lisa Cawley](#)

Partner / [London](#)

[Harkiran Hothi](#)

Partner / [London](#)

[Patrick Navein](#)

Associate / [London](#)

Related Services

Practices

- [Litigation](#)
- [Government, Regulatory & Internal Investigations](#)

Suggested Reading

- [17 June 2019 Article Shifting U.S. Enforcement Priorities—Should Chinese Companies be Worried?](#)

- [13 June 2019 Award Europe Women in Business Law Awards 2019](#)
- [11 June 2019 Kirkland AIM SEC Settles with Private Fund Adviser and Portfolio Manager Over Valuation Policies and Procedures](#)

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, portions of this publication may constitute Attorney Advertising.

© 2019 KIRKLAND & ELLIS LLP. All rights reserved